IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76484 of 2018

(Arising out of Order-in-Appeal No. KOL/CUS(CCP)/AA/302/2018 dated 05.02.2018 passed by Commissioner of Customs (Appeals), Kolkata.

M/s Praveen Kumar Gupta,
S/o Ramji Prasad Shaw, 49/5/H/51, Kari Marks Sarani,
Kolkata-700023.

..Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata.
Customs House, 3rd Floor, 15/1, Strand Road, Kolkata-700001.

.. ...**Respondent**

APPERANCE :

Shri Rajeev Agarwal, Advocate for the Appellant
Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No…75460/2023

DATE OF HEARING : 21.04.2023

DATE OF PRONOUNCEMENT: 16.05.2023

PER Rajeev Tandon :

Praveen Kumar Gupta. The appellant here in has filed this appeal assailing the order in appeal passed by the learned it Commissioner of Customs (Appeals) Kolkata.

2. The show cause notice states that on the basis of recorded information, the officers of Customs, CCP, West Bengal, on 10 June 2009, intercepted a carrier vehicle bearing registration number WB 19 D2303. Upon examination, the vehicle was found to contain shoes and cigarettes of foreign origin camouflaged with nearly 420 kgs of ginger. The driver of the vehicle Mukesh Rahman was taken into custody and his statement recorded under section 108 of the Customs Act. In his statement the driver of the vehicle stated that he was actually

contracted by a person named Mohammed Fayaz to carry ginger from the airport to Pusta Kolkata, that on three occasions in the past, he had indulged in this type of contract to carry the goods from the airport and unloaded them at different places for which he received Rs.1000 per trip . The notice further states that around 20:00 hours on the day of seizure one Shri Praveen Kumar Gupta appeared before the authorities seeking release of the vehicle purported to be of his friend. However, upon instant identification of Shri Praveen Kumar Gupta, as the owner of the contraband goods and the notified nature of cigarettes of foreign origin, Shri Praveen Kumar Gupta was arrested under section 104 of the Customs Act, 1962.

2.1 In his reply to the show cause notice, Shri Praveen Gupta denied the ownership of the said goods of foreign origin and stated that he had gone to the Custom House at the behest of his friend, to enquire about the seized vehicle and its release. The adjudication proceedings culminated in absolute confiscation of the foreign origin goods., confiscation of the seized vehicle and its release under section 125 of the Customs Act, imposition of penalty of Rs.1,00,00 on Shri Praveen Kumar Gupta under section 112 of the Customs Act, a penalty of Rs.20,000 under section 112(b) of the Customs Act on Shri Mukesh Rahman(who did not participate in the adjudication proceedings) and the confiscation of Indian origin, ginger used for concealment of the foreign origin goods.

3. In appeal before this Tribunal while denying the ownership of the foreign origin goods seized and ordered confiscation, the appellant had essentially the following to state:

That he was not offered cross examination of the co noticee on whose statement the entire case of the department against the appellant rests upon. It is his case that a bald statement of the co-accused, without any other corroboratory evidence to support the charge, cannot be fastened upon with the consequences of, as his being owner of the seized/ confiscated goods. Further, imposition of penalty under section 112 of the Customs Act, without specifying any subsection thereof was illegal and could not be levied. The appellants relied upon the decision in the case of Narain Das Commissioner of Customs, Patna, (2004, (178) 8/ELT/554/T), Birendra Kumar Singh v. Commissioner of Customs, Lucknow, 2006, (190) 8/ELT/46T In support of the contention that mere inculpatory statement of the co accused cannot be this basis for imposition of penalty, in the absence of any other independent corroborative evidence. In support of their contention that no penalty was imposable, in the absence of mention of the sub clause of section 112 of the Customs Act, he relied upon the Tribunal decision in PP Datta wing, Commander (retired) V. Commissioner of Customs, New Delhi, (2013, (293)ELT,127T).

4. Contesting the claim of the appellant, the revenue submitted that Shri Pankaj Kumar Gupta was the actual owner of the foreign origin goods and had been identified so by the driver of the vehicle who had been hired to carry the goods from the airport to the designated spot. That the driver had confirmed to have entered into business with him in the past as well. The department also relied on decisions rendered by various judicial authorities, including that of the Supreme Court in support in the case of **Naresh G Sukhwani v. Union of India,**

1998,83 ELT 258 SC for the premise that voluntary statement of co-accused can form the sole basis of conviction. It is their case that the statements given by the two accused/noticee were voluntary in nature, and had not been retracted.

5. It is an admitted fact on record that accused Praveen Kumar Gupta did visit the Custom House at around 8 PM on the day of the seizure allegedly for enquiry of the seizure of the vehicle and its release. It was at this point in time that the driver of the vehicle carrying contraband recognized the appellant as the owner of the smuggled contraband goods. and so informed the authorities. The appellant was arrested and action under the Customs Act initiated against him. While the appellant states that he had gone at the behest of his friend, he is at a complete loss to inform of and divulge any further details and particulars of the so called friend. In case Sri Praveen Kumar Gupta wanted to so help, it was incumbent upon him to have informed the details of his friend to the authorities for purpose of enquiry and investigations. With no information being provided by the accused appellant, undoubtedly, the needle of suspicion would point at him, having been so identified by the driver.

6. The appellants have further stated that they were not offered cross-examination of the accused driver to bring out the truth and on this plea alone, he can be given relief of the penalty imposed on him.

7. The fact of smuggling of contraband goods is not in dispute, it is also an admitted position that the accused appellant had in fact gone to Custom House at late evening hours, allegedly to check up on the seizure of the vehicle and seek its release show, stated to be prompted

at the behest of a friend whose even primary details like name, age, telephone number, residential address, place of work profession etc. and other basic information details like nature of business carried out, the accused appellant could provide. The plea of the appellant that statement of co-accused cannot be, the sole basis of imposition of penalty is the proposition that would vary with the facts and circumstances of the case. In fact the honourable Supreme Court in the case of **(Naresh G Sukhwani V. union of India, 1998(83) ELT 258 SC)** had held that the statement of co-accused when not retracted, was substantive piece of evidence. In the present case, as a matter of fact, the prompt and forthwith identification of the accused Sri Praveen Kumar Gupta, by the driver, co-accused clearly connects, the appellant to the contravention concerning smuggling of seized goods of foreign origin. The statement under section 108 of the Customs Act recorded by Customs Officers is material piece of evidence and this incriminating material incriminating the accused as well as the co-accused can certainly be used against them as substantive evidence. In so far as the plea of non-mention of the sub clause of section 112 of the Customs Act is concerned with, I am of the view that while the sub-clause ordinarily ought to have been spelled, however it is not an omission of such proportions as could result in non-imposition of any penalty as long as the nature of offence is discernible from the charges levied. On the plea of imposition of penalty on the basis of sole evidence of the statement of co-accused the Hon'ble High Court of Allahabad in the case of **Praveen Kumar Saraogi V. Union of India (2014 (299)ELT151ALL)** had categorically held that the statement of co-accused recorded under section 108 of the Customs Act can be used against the co-accused of the same case This order of the Hon'ble Allahabad High Court has also been upheld by the **Hon'ble Supreme Court, (2015 (132),ELT-A 146 SC).**

8. The voluntary statements of the accused as well as a co-accused bind them and the fact that the said statements were not retracted at any point in time, subsequently clearly lends complete credence to their evidentiary value. Under the circumstances, failure of an opportunity to cross examine cannot be considered as violative of principles of natural justice, the Hon'ble Supreme Court in the case of **Surjeet Singh Chhabra v. Union of India(1990(88)ELT 646SC)** have upheld this this proposition. I therefore, find no reason to interfere with the orders of the Commissioner (Appeals) which is upheld. The appeal filed by the appellant is dismissed.

(Pronounced in the open court on 16.05.2023)

Sd/-
(Rajeev Tandon)
Member (Technical)

T.K.